

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Otto and Ida M. Trabue	)	CSR-4974-O
	)	
	)	
Petition for Declaratory Ruling	)	
Under 47 C.F.R. § 1.4000	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: May 17, 1999**

**Released: May 19, 1999**

By the Chief, Cable Services Bureau:

**I. Introduction**

1.1.1 Petitioners Otto and Ida M. Trabue Inc. ("Petitioners") filed a Petition for Declaratory Ruling ("Petition") seeking a determination that The Garden Lakes Community Association's ("Association") covenants, conditions, and restrictions that prohibit or restrict the use of externally mounted over-the-air video programming reception antennas are prohibited by Section 1.4000 of the Commission's rules, the Over-the-Air Reception Devices Rule ("Rule").<sup>1</sup> The Association filed a response to the Petition and Petitioners replied.

**II. Background**

1.1.2 On August 6, 1996, the Commission issued a Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking ("*Report and Order*") adopting Section 1.4000 of the Commission's rules,<sup>2</sup> which prohibits governmental and private restrictions that impair the ability of antenna users to install, maintain, or use over-the-air reception devices.<sup>3</sup> The Rule implemented Section 207 of the

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<sup>1</sup>Section 1.4000 provides that parties may petition the Commission for a declaratory ruling under § 1.2 of the Commission's rules to determine whether a particular restriction is permissible or preempted. 47 C.F.R. § 1.4000(d).

<sup>2</sup>**47 C.F.R. § 1.4000.**

<sup>3</sup>See *In re Preemption of Local Zoning Regulation of Satellite Earth Stations and In re Implementation of Section 207 of the Telecommunications Act of 1996, Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service*, IB Docket

Telecommunications Act of 1996,<sup>4</sup> which requires the Commission to "promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of . . . direct broadcast satellite services."<sup>5</sup> The law promotes one of the primary objectives of the Communications Act of 1934: "to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges. . . ."<sup>6</sup>

1.1.3 The Rule applies to restrictions on property within the exclusive use or control of an antenna user who has a direct or indirect ownership interest in the property. Paragraph (a) of the Rule provides that a restriction impairs installation, maintenance, or use of a protected antenna<sup>7</sup> if it: (1) unreasonably delays or prevents installation, maintenance, or use; (2) unreasonably increases the cost of installation, maintenance, or use; or (3) precludes reception of an acceptable quality signal.<sup>8</sup> The only exceptions to the Rule are restrictions that are necessitated by safety or historic preservation concerns, and even then, the restrictions must be as narrowly tailored as possible, impose as little burden as possible, and apply in a nondiscriminatory manner throughout the regulated area.<sup>9</sup>

No. 95-59 and CS Docket No. 96-83, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 11 FCC Rcd 19276 (1996) (consolidated) (*Report and Order*). The Rule became effective on October 14, 1996. Public Notice DA 96-1755 (Oct. 23, 1996).

<sup>4</sup>Pub. L. 104-104, 110 Stat. 114 (Feb. 8, 1996).

<sup>5</sup>Telecommunications Act of 1996, Pub. L. No. 104-104, § 207, 110 Stat. 56, 114 (1996).

<sup>6</sup>Communications Act of 1934, § 1 as amended, 47 U.S.C. § 151.

<sup>7</sup>The Rule applies to antennas designed to receive direct broadcast satellite service that are one meter or less in diameter; antennas designed to receive video programming services via multipoint distribution services, including multichannel multipoint distribution services, instructional television fixed services, and local multipoint distribution services that are one meter or less in diameter or diagonal measurement; and antennas designed to receive television broadcast signals. 47 C.F.R. § 1.4000(a).

<sup>8</sup>47 C.F.R. § 1.4000(a).

<sup>9</sup>47 C.F.R. § 1.4000(b).

1.1.4 The Rule provides parties who are affected by antenna restrictions the opportunity to petition the Commission to determine if the restrictions are permissible or prohibited by the Rule.<sup>10</sup> The Rule places the burden of demonstrating that the challenged restriction complies with the Rule on the party seeking to impose the restriction.<sup>11</sup> The Rule also provides that no fine or other penalties shall accrue against an antenna user while a proceeding is pending to determine the validity of any restriction.<sup>12</sup>

### III. The Petition

1.1.5 Petitioners are homeowners in the Garden Lakes planned community, located in Avondale, Arizona. Petitioners challenge the following regulation imposed by the Association's Architectural Review Committee:

#### O. EXTERIOR ACCESSORIES.

##### 1. Antennas [amended 9/12/96]

Prior approval of the Architectural Review Committee for an antenna that is designed to receive direct broadcast satellite service, including direct-to-home satellite services, that is one meter or less in diameter; or an antenna that is designed to receive video programming services via multipoint distribution services, including multichannel multipoint distribution services, instructional television fixed services, and local multipoint distribution services, and that is one meter or less in diameter or diagonal measurement; or an antenna that is designed to receive television broadcast signals, is not required, provided it meets the following requirements:

- a) Antennas and dishes shall be painted in a fashion that blends into the background against which it is mounted provided such painting will not interfere with reception. Mounting materials, accessories, and cabling shall be painted in a fashion that blends into the background against which it is mounted.

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<sup>10</sup> 47 C.F.R. § 1.4000(d).

<sup>11</sup> 47 C.F.R. § 1.4000(e).

<sup>12</sup> 47 C.F.R. § 1.4000(a)

1.1.6 Petitioners allege that on February 1, 1997, the Association cited them for erecting a direct broadcast satellite (DBS) antenna without prior approval; that on February 10, 1997, the Association instructed them to "paint the entire apparatus the same color as the house;" and that on February 27, 1997, the Association sought to impose on Petitioners a fine of fifty dollars per day. Petitioners argue that the Association's painting requirement is based on aesthetic concerns and is not necessary for safety or historic preservation.

1.1.7 Petitioners further contend that painting the "entire apparatus" is a modification of the unit that will void the warranty. In support, Petitioners provide a copy of their warranty from Thomson Consumer Electronics ("Thomson"), which states that Thomson's warranty will not cover "a unit that has been modified."

1.1.8 Further, petitioners argue that the cost of painting the dish would be unreasonable and that the cost of a new warranty also would be unreasonable in relation to the cost of the satellite dish. Petitioners allege that painting can cost as much as 40% to 50% of the price of the dish. Moreover, Petitioners contend that not everyone who owns a DBS satellite dish has been required to paint it, and that the Association does not require painting of other, arguably comparable items, such as telephone boxes and cable boxes, both of which are on the visible front side of homes.

#### IV. The Association's Response

1.1.9 The Association contends that painting the antenna and mounting apparatus of the antenna does not void the manufacturer's warranty. In support of this position, the Association provides a memorandum from Robert Markham, Vice President, Sales and Marketing, Commercial and Consumer Electronics of the Arizona Wholesale Supply Company,<sup>13</sup> stating:

Bill Mingle with the Engineering department of Thompson [sic] Consumer Electronics (DSS Division) explained to me that nonmetallic paint on DSS dishes (not including the LNB [Low Noise Block converter]) will not significantly suppress signal as to effect the performance of the DSS System.

Bill further explained that the dish should be properly prepared for painting by light sanding with 400 grit paper and care must be used not to paint the feed horn, LNB, logo[s], or connectors/cables. If these rules are followed the manufacturers [sic] warranty will not be voided.

The Association contends that even if painting voided the warranty, it would not impose an unreasonable expense to repair the satellite dish because it would be necessary to replace only "the component," which

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<sup>13</sup>The Association does not explain how the opinion of Arizona Wholesale Supply Company is relevant to these proceedings.

retails for \$21.95.<sup>14</sup> The Association further alleges that the warranty period for "this component" is 90 days from purchase, which already elapsed.<sup>15</sup>

1.1.10 The Association argues that the dish can be painted for a minimal cost.<sup>16</sup> Further, Jim Conaway, a principal of Planned Development Services, Inc., the Association's management agent, states that he would paint an antenna at no charge if a homeowner was physically unable to paint the dish and financially unable to pay a contractor.<sup>17</sup> The Association states that "[m]any homes within the community have complied with the painting requirement and no degradation of signal has occurred." The Association furnishes affidavits of two homeowners who have painted their satellite dishes to conform to the Association's requirements and have experienced "no degradation nor loss of signal." In addition, the Association provides a statement from a local satellite dealer stating that a satellite dish may be painted "without losing the quality of [the] picture, as long as non-metallic paint is used."

1.1.11 The Association concedes that its restriction is not founded on safety concerns, and that it erred in attempting to require prior approval of Petitioners' antenna installation. The Association argues that it requires some comparable devices such as trash receptacles and air conditioners to be screened and asserts that it does not have authority to regulate the appearance of "public utility easements." It refers to "Paragraph 19 of FCC 96-328 [the *Report and Order*]" as the basis for its painting requirement and as justification for the costs imposed thereby.<sup>18</sup> The Association also claims it has a "clearly defined aesthetic objective" and is thereby in compliance with 47 C.F.R. § 25.104.<sup>19</sup>

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<sup>14</sup>The Association does not define "the component" but cites Thomson Consumer Electronics as the source for the cost of the replacement part. Response of the Garden Lakes Community Association ("Association Response") at 3.

<sup>15</sup>The Thomson Consumer Electronics warranty appended to both the Petition and the Association's response has a duration of one year. It offers free replacement after 90 days and imposes some labor charges for repair or replacement after 90 days. *See* Exhibit B of Association Response.

<sup>16</sup>In support, the Association provides an affidavit from Thomas Walker, a licensed contractor in the state of Arizona, who states that he will provide all the materials and labor to paint an eighteen inch satellite antenna and its mounting apparatus and any exposed wiring for a total cost of \$45.00. *See* Exhibit C of Association Response.

<sup>17</sup>Association Response at Exhibit D, Statement of Jim Conaway, Community Manager, Garden Lakes Community Association.

<sup>18</sup>We note that paragraph 19 of the *Report and Order* requires that the costs of complying with restrictions not be unreasonable in light of the cost of the antenna

## V. Comments

1.1.12 BellSouth Corporation (BellSouth), the Consumer Electronics Manufacturers Association (CEMA), Pacific Bell Video Services (Pacific Bell), and David W. Bullington (Bullington) filed comments in support of the petition. The Community Associations Institute (CAI) filed in support of the Association. BellSouth contends that the Commission should hold the Petition in abeyance until the Commission further revises the Rule, as advocated by BellSouth in its Petition for Reconsideration, and that the Commission should direct the Association to forbear from taking any action adverse to the Petitioners or others similarly situated during the pendency of BellSouth's petition as required by Section 1.4000(a)(3). BellSouth also argues that the Association's painting requirement is burdensome, costly and would violate the warranty. CEMA offers general support for the Petitioners and urges the Commission to rule on the petitions so as to provide broad and controlling precedents but offers no comment on the warranty issue.

1.1.13 Pacific Bell argues that the Association's antenna restrictions violate the Rule because they require prior approval, which is prohibited unless necessary for safety or historic preservation; require painting, which is unreasonable and impairs reception; and threaten fines, which chill lawful conduct. Pacific Bell notes that the original color of Petitioner's antenna blends into the background against which it is mounted and asserts that the Association's painting requirement exceeds the permissible painting requirement described in paragraph 19 of the *Report and Order* because it requires that the entire apparatus be painted the color of the house. Pacific Bell notes also that in its Joint Petition for Partial Reconsideration, filed together with the Wireless Cable Association and others, it argued that any painting requirement could unreasonably increase the cost of using an antenna because the many colors used to paint houses would create an impossible burden for the industry to comply with except on a custom basis.

1.1.14 Mr. Bullington, a homeowner in the Garden Lakes development, states that painting alters the finish of the dish and thereby constitutes a modification for warranty purposes. He notes that the memorandum from Arizona Wholesale Supply proffered by the Association to support its contention that painting will not void the warranty if the logos and cables are not painted conflicts with the Association's requirements to paint the entire apparatus. Mr. Bullington claims he has extensive personal telecommunications and electronics experience and disagrees that painting will not adversely affect the performance of the antenna "in view of the hygroscopic properties of many commercial paints" which may crack and peel over time.

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itself and its installation as well as the "visual impact of the antenna" and suggests that "a requirement to paint an antenna in a fashion that will not interfere with reception so that it blends into the background against which it would be mounted would likely be acceptable."

<sup>18</sup>We note that the Commission's rule in Section 25.104 applies only to satellite dishes larger than one meter and to governmental restrictions and, therefore, is not relevant to this proceeding.

1.1.15 In opposition to the Petition, CAI argues that associations may impose reasonable restrictions designed to minimize the visual effect of an antenna on the owner's property. While acknowledging that it has not seen the restriction in question, CAI contends that the painting requirement imposed on Petitioners is a reasonable restriction permitted by the Commission's rules. CAI argues that the Commission's affirmative reference to painting in paragraph 19 of the *Report and Order* suggests that a painting requirement is not an onerous restriction. CAI contends that Petitioners have not justified their contention that painting the dish would constitute a modification of the unit under their warranty and states that it contacted a Thomson customer service representative who said that painting a dish would not violate the warranty as long as the paint did not cause damage to the "plastic tip of the antenna." Further, CAI contends that because "paint is inexpensive and can be applied prior to, during or after installation," no evidence in the record supports a conclusion that painting would unreasonably increase the cost of installation, maintenance or use. Finally, CAI argues that Petitioners have presented no evidence to demonstrate that painting the antenna would render it unable to receive acceptable quality signals.

## **VI. Petitioners' Reply**

1.1.16 In their reply comments, Petitioners reiterate their objections to the Association's painting requirement and to the threatened fine for non-compliance. Specifically, Petitioners argue that the burden of proof in this proceeding is on the Association and that the Association has not met its burden and cannot shift the burden to Petitioners. Petitioners assert that the Association's estimate for the cost of painting the dish does not take account of the special requirements for painting in a manner consistent with the warranty requirements. Petitioners contend that DBS satellite dishes installed on four homes at the Garden Lakes Estates were not painted to match the exterior color and object, therefore, to the Association's disparate enforcement of the painting requirement. They also object to the discriminatory treatment of satellite dishes in view of the absence of comparable painting requirements for air conditioning units and trash receptacles, which are visible in the community. In response to the Association's assertion that the warranty in question has expired, Petitioners explain that they purchased an extended warranty that extends the original warranty for another year.<sup>20</sup> Petitioners further contend that the gray color of the dish is not inconsistent with other exterior colors on the home. Specifically, petitioners state that the dish is located on the patio roof which has gray trim and is near two gray overhead light fixtures.<sup>21</sup>

## **VII. Discussion**

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<sup>20</sup>Petitioners' Reply at 4 and Enclosure 3.

<sup>21</sup>They note, too, that the exterior of the house includes red tile, light cream sides, dove gray trim, black windows, and a brown door. Petitioners' Reply at 5 and Enclosure 4.

1.1.17 The question presented here is whether this Association's requirement that antenna users paint an antenna and its accessories in order to blend with the color of the house violates the Rule.<sup>22</sup> The Rule prohibits antenna restrictions that impair installation, maintenance or use by imposing unreasonable delay, unreasonable expense, or precluding reception of an acceptable quality signal.<sup>23</sup> In general, a requirement that a satellite dish be painted to blend with the color of the house does not violate the Rule, provided the specific requirements do not result in voiding the manufacturer's warranty or otherwise impose unreasonable expense. In this case, for the reasons described below, we conclude that this Association's antenna restriction is permissible, in part, and preempted in part.

1.1.18 A requirement to paint a satellite dish is not *per se* prohibited by the Rule and is offered in the *Report and Order* and *Order on Reconsideration* as a requirement likely to be acceptable under the Rule.<sup>24</sup> Although not prohibited in every case, here the Association's requirement goes beyond painting the dish itself to require that the "mounting materials, accessories and cabling"<sup>25</sup> associated with the dish must also be painted. This part of the Association's requirement conflicts with the memorandum offered by the Association as evidence that its painting requirement does not void antenna warranties. This memorandum states that certain parts of the antenna, including the cables, should not be painted.<sup>26</sup> Voiding the manufacturer's warranty impairs maintenance and use by imposing unreasonable expense. We conclude, therefore, that the Association's painting requirement is preempted insofar as it applies to cables and other accessories the painting of which would void the Thomson warranty.

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<sup>22</sup>We have only been asked to rule on those parts of the Association's regulations that pertain to prior approval and painting. This Order expresses no opinion on other provisions of the Association's regulations.

<sup>23</sup>47 C.F.R. § 1.4000(a).

<sup>24</sup>*Report and Order* at ¶ 19 and *In re Preemption of Local Zoning Regulation of Satellite Earth Stations and In re Implementation of Section 207 of the Telecommunications Act of 1996, Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service*, CS Docket No. 96-83, *Order on Reconsideration*(" *Order on Reconsideration*"), FCC 98-214 at ¶ 45 (released September 25, 1998).

<sup>25</sup>*See* antenna regulation quoted at paragraph 5, *supra*.

<sup>26</sup>*See* discussion of Association's memorandum describing a conversation with a Thomson engineer, *supra*, ¶ 9 (To avoid invalidating the Thomson warranty here in issue, an antenna user should "not paint the feed horn, [Low Noise Block converter], logo[s], or connector/cables.").



1.1.19 As to the requirement to paint the dish itself, there is no evidence in this record that such a requirement imposes unreasonable delay or precludes reception of an acceptable quality signal, but Petitioners assert that the requirement to paint their satellite dish imposes an unreasonable expense. It is unclear from this record whether the alleged unreasonable expense arises from the actual cost of painting the dish or from the more speculative cost of repairing or replacing the dish if painting voids the manufacturer's warranty. Petitioners have not provided specific information regarding either the cost to paint the dish<sup>27</sup> or the expense they would incur if their warranties are voided. The Association's position is similarly unclear. The Association's management agent states that he is willing to pay for painting an antenna under certain circumstances but does not specify whether those circumstances apply to Petitioners.<sup>28</sup>

1.1.20 Based on the limited record before us, we find that the Association's requirement to paint the dish itself -- as distinguished from the cables and accessories discussed above -- does not appear to void this manufacturer's warranty. In addition, we interpret the Association's offer to pay for painting the dish to apply to Petitioners' dish. Based on these findings, the Association's requirement that the dish be painted does not impose an unreasonable expense or otherwise impair installation, maintenance or use of antennas covered by the Rule.<sup>29</sup>

1.1.21 We also note that the Association's regulations, as submitted for the record in this proceeding, require prior approval of antenna installation by its Architectural Review Committee unless the antenna, dish, mounting materials, accessories and cabling are painted to blend with the background against which the antenna is mounted and the antenna is placed so that it is not visible. We conclude, as we have previously held, that the Association's requirement for prior approval is prohibited by the Rule because it can impose an unreasonable delay.<sup>30</sup>

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<sup>27</sup>Petitioners estimate the cost of painting the dish at "40 to 50 percent" of the cost of the dish but do not provide either the cost of the dish or the basis for this estimate. Petitioners' Reply at 3. The Association offers an affidavit from a licensed contractor that he would charge \$45.00 to paint a dish and its accessories. Association Response at Exhibit C.

<sup>28</sup>See note 17, *supra* ("If requested, and I [management agent for the Association] became aware that an owner was unable to pay and was physically unable to perform the work, I would paint the antenna as a free service in order to conform to the Association's Rules.")

<sup>29</sup>If the Association pays to paint the dish in the manner described that does not void the warranty, then there would be no unreasonable expense imposed on Petitioners.

<sup>30</sup>See *Report and Order*, ¶ 17; *Order on Reconsideration*, ¶ 45; *In re Star Lambert and SBCA*, 12 FCC Rcd 10424 (CSB 1997); *In re MacDonald*, 13 FCC Rcd 4844 (CSB 1997); and *In re OmniVision*, 13 FCC Rcd 4826 (CSB 1997). In its response to the Petition, the Association acknowledges that "the Association's correspondence was in

1.1.22 Based on the information in the record, we are unable to rule on Petitioners' allegations that there is disparate or discriminatory enforcement of the painting requirements in Garden Lakes Estates. We cannot determine from this record the accuracy of the allegation that the Association has permitted some homeowners to use satellite dishes that have not been painted. The record is also unclear on whether cable and telephone boxes are subject to the same painting requirements as satellite dishes and other antennas, and, if not, whether there are external restrictions on the Association's authority to require that these items be painted. With respect to exterior air conditioning units and trash receptacles, although the Association does not require painting, it does require screening of such items if they are visible from neighboring units.<sup>31</sup>

### VIII. Ordering Clauses

1.1.23 For the foregoing reasons, **IT IS ORDERED**, pursuant to Section 1.4000(d) of the Over-the-Air Reception Devices Rule, 47 C.F.R. Section 1.4000(d), and Section 1.2 of the Commission's rules, 47 C.F.R. Section 1.2, that the Petition for Declaratory Ruling filed by Otto and Ida Trabue is **GRANTED** to the extent indicated in paragraphs 18 and 21, above, and in all other respects is **DENIED**.

1.1.24 This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Deborah A. Lathen

Chief, Cable Services Bureau

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error requiring prior approval." Association Response at 5.

<sup>31</sup>Association Response at 4 and Exhibit 2 ("No machinery, fixtures or equipment of any type, including but not limited to, heating, cooling, air conditioning and refrigeration equipment and clotheslines, may be placed on any lot or Parcel without the prior approval of the Architectural Review Committee. Approval shall be conditioned upon screening or concealment from view of neighboring or public property. . . . Ground mounted air conditioning units shall be concealed by a solid enclosure on all sides Visible from Neighboring Property.").